(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: JUL 19 2013 OFFICE: NEBRASKA SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The AAO rejected the petitioner's appeal, and then dismissed a subsequent motion to reconsider. The matter is now before the AAO on a motion to reopen and reconsider. The AAO will dismiss the motion.

The petitioner seeks to classify the beneficiary under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner, a biaxially oriented polypropylene and cellulose films supplier, seeks to employ the beneficiary as a process engineer. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the beneficiary qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

In its rejection notice of September 22, 2011, the AAO stated:

> Under the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 292.4(a) . . . , if an attorney files an appeal with the Administrative Appeals Office, the filing must include a newly executed Form G-28 Notice of Entry of Appearance as Attorney or Representative. . . .
>
> The petitioner filed the Form I-140 petition on July 30, 2009, with a Form G-28 dated July 24, 2009, naming as the petitioner's attorney of record. The director denied the petition on May 27, 2010. Another attorney with the same firm, filed the appeal on June 24, 2010, but the filing did not include a new Form G-28 as required. Instead, the petitioner submitted a photocopy of an earlier Form G-28 from managing partner of prepared in conjunction with a different petition. . . .
>
> Under the regulation at 8 C.F.R. § 103.3(a)(2)(v)(A)(*2*), if an appeal is otherwise properly filed without a Form G-28, then USCIS must contact the attorney and attempt to obtain the required form. Therefore, on August 31, 2011, the AAO instructed to submit the required form within ten (10) calendar days. . . .

The allotted time has elapsed, and the AAO has received no response from Mr. Gillman or any other attorney at the firm.

Because an attorney filed the appeal without a new, properly executed Form G-28, the regulation at 8 C.F.R. § 103.3(a)(2)(v)(A)(*2*)(*i*) requires the AAO to reject the appeal.

In dismissing the petitioner's subsequent motion on June 18, 2012, the AAO stated:

The petitioner's present attorney of record is the managing partner of the law firm that employed On motion, counsel does not contest any of the facts stated in the AAO's September 2011 rejection notice, and counsel does not dispute that a newly executed Form G-28 was required on appeal. Counsel acknowledges that " did not respond" to the AAO's request for a new Form G-28. Counsel explains that had left the firm by the time of the AAO's August 2011 request, and asserts: "Had this matter been properly brought to my attention, I would have explained the circumstances to the AAO."

Regarding the initial filing of the appeal, counsel claims: " . . . had signed the I-290B form to appeal the denial but had not filed it. When I discovered that the I-290B form had not been filed and furthermore, that had not obtained a G-28 form from the petitioner, I signed and included in the package a G-28 form. . . . The NSC [Nebraska Service Center] Director obviously found my G-28 acceptable."

The record shows that present counsel did not sign a new Form G-28 to accompany the appeal. Rather, the Form G-28 that accompanied the appeal was a photocopy of a Form G-28 that had had previously signed and dated May 17, 2010. That photocopy shows a USCIS receipt stamp dated June 24, 2010, at 8:00 a.m., the same date and time stamped on the Form I-290B. had originally signed that Form G-28 to accompany another petition filed by the same petitioning employer on May 18, 2010. If the director "found [that] G-28 acceptable," the director did so in error.

Counsel has not disputed the basic facts underlying the AAO's rejection notice: the appeal did not include a new Form G-28 signed by an authorized official of the petitioning entity and by (the party who signed the appeal form), and the AAO received no response when it requested that required form. Without that Form G-28, the AAO had no authority to accept the appeal as properly filed, and the regulations cited above therefore compelled the rejection of the appeal. . . .

The motion includes a newly-executed Form G-28, naming as the petitioner's attorney of record. did not sign the initial Form I-290B Notice of Appeal, and therefore his new Form G-28 does not remedy the original deficiency that led to the rejection of the appeal. Furthermore, the AAO had already provided counsel's firm an

> opportunity to submit the Form G-28. Counsel repeatedly acknowledges that there was no response to the request. Therefore, counsel's firm forfeited the opportunity to resolve the matter in a timely manner. The fact that the AAO, rather than the director, issued the request did not in any way absolve counsel of the need to respond to the request, or grant counsel an endless span of time in which to address it.
>
> Counsel has not shown that the AAO's decision was incorrect based on the evidence of record at the time of the initial decision. Therefore, the filing does not meet the requirements of a motion to reconsider, and the AAO must dismiss the motion as required by 8 C.F.R. § 103.5(a)(4).

The petitioner's motion from the above decision alleges no new facts and includes no supporting evidence. Therefore, the motion does not meet the requirements of a motion to reopen at 8 C.F.R. § 103.5(a)(2). The motion consists of counsel's discussion of law and procedural issues, and the exhibits submitted on motion all relate to regulations, case law and policy memoranda, all addressing matters of law rather than of fact.

In a brief submitted on motion, counsel states: "the attorney substitution language in [8 C.F.R.] § 292.4(a) would have allowed me to be substituted for as the attorney of record." The issue, however, is not one of attorney substitution. Rather, the petitioner has not shown that was properly the attorney of record at the time he signed and filed Form I-290B. Counsel, on motion, has not shown that a substitution of attorneys, after the fact, can overcome the improper filing of an appeal.

Counsel protests that over a year elapsed between the filing of the appeal and the AAO's communication requesting a new Form G-28, by which time the attorney who filed the appeal had left the firm. Counsel does not claim, and the record does not show, that the attorney or his former firm took any timely action to inform the AAO of this change of circumstances or provide updated contact information for him.

Counsel states that the AAO "was wrong to cite 8 C.F.R. § 103.3(a)(2)(v)(A)(*1*) as legal authority for the threatened rejection of the appeal," because that regulation "is intended to cover only an appeal deemed improperly filed because it is filed by a person or entity not authorized to file it." Counsel observes that the cited clause "does not even mention a Form G-28." Counsel claims that this omission is because the issue of legal representation is entirely separate from the issue of whether a given party has standing to file an appeal.

The regulation at 8 C.F.R. § 103.3(a)(2)(v) and its relevant subsections provide, in pertinent part:

> (v) *Improperly filed appeal—*
>
> (A) *Appeal filed by a person or entity not entitled to file it—*
>
> (*1*) *Rejection without refund of filing fee.* An appeal filed by a person or

> entity not entitled to file it must be rejected as improperly filed. In such a case, any filing fee the Service has accepted will not be refunded.
>
> (*2*) *Appeal by attorney or representative without proper Form G-28*—
>
> > (*i*) *General*. If an appeal is filed by an attorney or representative without a properly executed Notice of Entry of Appearance as Attorney or Representative (Form G-28) entitling that person to file the appeal, the appeal is considered improperly filed. In such a case, any filing fee the Service has accepted will not be refunded regardless of the action taken.

An appeal filed without a valid Form G-28 is "improperly filed" and, as such, must be rejected. The regulation at 8 C.F.R. § 103.3(a)(2)(v)(A) and all of its subsections concern "a person or entity not authorized to file" an appeal, including subsection (*2*) which regards an "attorney or representative without proper Form G-28." Subsection (*2*)(i) plainly states that the Form G-28 is what "entitl[es] that person to file the appeal." Without that required form, the attorney filing the appeal is "not entitled to file it," and thereby falls within the compass of subsection (*1*). The two subsections are not, as counsel claims, mutually exclusive. Counsel observes that subsection (*2*) does not mention rejection of appeals, and claims that this is because rejection is not an option in such cases. In fact, that subsection does not mention rejection because to do so would be redundant, repeating the rejection clause in subsection (*1*).

Before rejecting the appeal, the AAO had instructed the firm that filed the appeal to provide a "new Form G-28." In response, the firm submitted a photocopy of a Form G-28 signed by counsel on May 17, 2010, which was more than a month before the filing of the appeal. Furthermore, an official of the petitioning entity executed that Form G-28 in reference not to a Form I-290B Notice of Appeal or Motion, but in reference to a Form I-140 petition. The photocopied Form G-28, therefore, did not establish that counsel represented the petitioner with respect to the filing of the appeal. Rather than address these issues, on motion counsel debates the exact meaning of the word "new." Counsel disputes the AAO's description of the Form G-28 as a "photocopy," and maintains that he submitted an original document, but even if this were so, it would not overcome the issues enumerated above.

Counsel repeats an assertion from the previous motion – specifically, that the regulations at 8 C.F.R. §§ 103.3(a)(2)(v)(A)(*2*)(*ii*) and (*iii*) require the "reviewing official," not the AAO, to request a properly executed Form G-28, and that the AAO "clearly disregard[ed] and misinterpret[ed]" those regulations by requesting the form directly. Even if counsel had shown that the AAO lacked the authority to request Forms G-28 in this manner, it would not follow that the AAO would have to overlook the omission of the Form G-28. In such an event, the appeal still would have been improperly filed. The outcome, instead, would be rejection of the appeal with no prior attempt by the AAO to obtain the form.

Attorney [redacted] filed the appeal on the petitioner's behalf. The petitioner did not submit a properly executed Form G-28 authorizing [redacted] to file appeals for the petitioner in that manner. Therefore, under the regulation at 8 C.F.R. § 103.3(a)(2)(v)(A)(*2*)(*i*), [redacted] did not establish that he was a person authorized to file the appeal. This circumstance required the AAO to

reject the appeal under the regulation at 8 C.F.R. § 103.3(a)(2)(v)(A)(*1*). Counsel, on motion, has not overcome these basic findings. Because the petitioner has not established that the decision was incorrect based on the evidence of record at the time of the initial decision, the motion does not meet the requirements of a motion at 8 C.F.R. § 103.5(a)(3).

Beyond the procedural issues, counsel acknowledges: "the Petitioner obtained the approval of an Alien Employment Certification on behalf of the Beneficiary, for which the Petitioner has also filed an I-140 petition." Counsel asserts that the petitioner continues to pursue the present matter because the beneficiary's "oldest child turned 21 subsequent to the filing of the NIW on the Beneficiary's behalf, which means that if the appeal is rejected, the Beneficiary's oldest child will not be able to obtain lawful permanent residence along with the Beneficiary, his wife and their other children." The petitioner filed the present petition on July 30, 2009, four days before the beneficiary's oldest child reached age 21.

The timeline for the other petition is as follows: On February 6, 2009, the petitioner applied for labor certification on the beneficiary's behalf. The Department of Labor approved the labor certification on December 2, 2009. Based on that approved labor certification, the petitioner filed a Form I-140 petition on August 25, 2010, seeking to classify the beneficiary as a professional under section 203(b)(3) of the Act, 8 U.S.C. § 1153(b)(3). The receipt number of that petition is SRC 10 800 27004.

After the petitioner filed the present motion, but before the director forwarded the file to AAO for review, the Director, Texas Service Center, approved the August 2010 petition on March 20, 2013. The beneficiary is, therefore, now the beneficiary of an approved immigrant petition based on a job offer from the petitioner. Under the regulation at 8 C.F.R. § 204.5(d), an approved petition with a labor certification has a priority date corresponding not to the petition's filing date, but to the date that the Department of Labor accepted the application for labor certification. Therefore, the petitioner's approved petition has a priority date of February 6, 2009, which is almost six months earlier than the July 30, 2009 filing date of the petition now before the AAO on motion. Approval of the present petition would not provide an earlier priority date.

The petitioner has not introduced new facts or shown that the AAO's decision was incorrect based on the evidence of record at the time of the initial decision. Therefore, the filing does not meet the requirements of a motion to reopen or a motion to reconsider, and the AAO must dismiss the motion as required by 8 C.F.R. § 103.5(a)(4).

ORDER: The motion is dismissed. The AAO's rejection notice of September 22, 2011 remains undisturbed.